

**REPORT TO THE MICHIGAN LEGISLATURE
GROUNDWATER CONSERVATION ADVISORY COUNCIL
JUNE 20, 2005**

Introduction

The Groundwater Conservation Advisory Council (Council) was created by Section 32803 of 2003 PA 148 (Act 148). The Michigan Department of Environmental Quality (MDEQ) is the lead state agency to implement Act 148.

The Council's responsibilities are contained in Section 32803(2) and include:

- (a) Study the sustainability of the state's groundwater use and whether the state should provide additional oversight of groundwater withdrawals.
- (b) Monitor Annex 2001 implementation efforts and make recommendations on Michigan's statutory conformance with Annex 2001, including whether groundwater withdrawals should be subject to best management practices or certification requirements and whether groundwater withdrawals impact water-dependent natural features.
- (c) Study the implementation of and the results from the groundwater dispute resolution program created in part 317.

Purpose of this Report

The Council has completed work on Section 32803(2)(c), and this report will cover the findings and recommendations on this specific portion of their work. The aquifer protection and groundwater dispute resolution program created in Part 317, Aquifer Protection and Dispute Resolution, was enacted into law on August 29, 2003, as 2003 PA 177 (Act 177), which added Part 317 to the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (Act 451). Should other substantive issues arise that materially affect our recommendations, an amended report will be prepared and sent to all applicable parties.

The full report to the Legislature is due on February 8, 2006, and this document will be included in that report.

Agreement

The findings and recommendations contained in this report are based upon full consensus agreement of all Council members.

Groundwater Issues and Program Challenges

The work of the Council consisted of: (1) review Act 177; (2) review of all documents prepared by the MDEQ and the Michigan Department of Agriculture (MDA) to implement the program; (3) review of program summary information furnished by the two state departments; (4) discussion of the program in detail after a presentation to the Council at one of their public meetings; and (5) held two Council subcommittee meetings to review the program and identify issues for full Council deliberations.

The groundwater dispute resolution program is implemented by two state agencies – the MDEQ and MDA. The two agencies have met frequently to define the duties and procedures necessary for successful implementation and entered into a Memorandum of Understanding to assure that disputes involving an agricultural well are investigated and resolved by the MDA. There were no complaints received by either state agency or submitted to the Council concerning the responsiveness of the two agencies in implementing the statute.

From September 29, 2003, until July 1, 2004, citizen complaints were limited under the statute to two geographic areas in the state that are at greatest risk for potential groundwater disputes, as identified by MDEQ Director Steven E. Chester on October 8, 2003, in a letter to Lieutenant Governor John D. Cherry and Speaker of the House Rick Johnson. Director Chester designated:

1. The townships of Fremont, Richland, Lakefield, and Jonesfield in Saginaw County, and
2. Monroe County (all townships).

Beginning July 1, 2004, the program was administered on a statewide basis.

Groundwater disputes between “high capacity wells” and “small quantity wells” are the subject of this legislation. There are many technical and complex issues involved with a groundwater dispute, and the Council recognizes that all issues have not been experienced in the limited time of implementation of Act 177. The Council believes that other issues may arise in future years and that these findings will need periodic review as discussed below.

The number of citizen complaints, alleging a groundwater dispute between small quantity wells and high capacity wells, is highly variable and dependent upon many factors, including climate. The availability of groundwater is dependent upon the water levels in the state’s aquifers under both static and pumping conditions. Water levels, in turn, vary with recharge conditions.

The legal right of a property owner to the use of groundwater is based on the common law doctrine of “reasonable use.” This is the principle that must guide Director Chester in determining whether or not to issue an order declaring a groundwater dispute, if a resolution of a complaint cannot be reached.

Attached to this report are spreadsheets containing a complete summary of all complaints received to date in the program and a description of the resolution of those complaints. To date, the Director of the MDEQ has not issued any orders declaring a groundwater dispute.

Findings and Recommendations

Issue #1 – Is the program successful and operating as the Legislature intended?

Discussion – The Council concludes that the groundwater dispute resolution program is operating successfully for the short duration that it has been in place. However, many provisions in the statute have not been used and evaluated. For example:

1. Since no orders have been issued to date under Section 31703(1) or 31703(2), there have been no appeals under Section 31708; no orders issued for temporary provision of water under Section 31705; no cost recovery by the state under Section 31706(2); and no enforcement initiated under Section 31713.
2. To date, the MDEQ has not used the aquifer protection revolving fund created under Section 31710 because disputes have been resolved, and two major hydrogeologic studies were available, funded in the past cooperatively by the state and the U.S. Geologic Survey, in the two primary areas of dispute experienced to date.
3. The owners of high capacity wells involved in the disputes to date have been very cooperative in working with the state agencies and the citizens. Timely and reasonable compensation has been provided to small quantity well owners. In some instances, the owner of a high capacity well has provided compensation even when the Act 177 requirements did not strictly apply.

Finding – The groundwater dispute resolution program is successful and operating as intended by the Legislature, recognizing that the scope of the program to date is limited and not all existing provisions of the statute have been used.

Issue #2 – Is the program adequately funded?

Discussion – The MDEQ receives \$200,000 in general fund support (Fiscal Year 2004 and Fiscal Year 2005) and is authorized to hire two full-time equivalent (FTE) staff. In addition, the aquifer protection revolving fund was capitalized at \$500,000 (appropriated at \$450,000).

The MDA has no appropriation to implement their portion of the program.

Findings and Recommendations – The program is not adequately funded for MDA work. The program is adequately funded for MDEQ work to date, recognizing that many provisions of the statute have not been used. The Council recommends that the MDA be appropriated funds adequate to meet their program responsibilities based upon their level of effort in the past two years and continuing into the future.

Issue #3 – Definitions

Discussion – Two key definitions in Act 177 are “high capacity wells” and “small quantity wells.” The Council notes that a change in terminology would improve the public understanding of the definitions.

Recommendation – The Council recommends that the definition of “small quantity well” contained in Section 31701(q) be changed to “low capacity well” for improved clarity and consistency in terminology used in Act 177.

Issue #4 – Are all high capacity wells covered in Act 177?

Discussion – All high capacity wells are not covered. Coverage includes industrial or processing facilities, irrigation facilities, farms, and public water system wells with the capability of withdrawing 100,000 or more gallons of groundwater in one day.

The Council discussed other types of high capacity wells in a regular meeting open to the public. One such use of high capacity wells deemed important is for “lake augmentation,” the practice of withdrawing groundwater and discharging to a lake or impoundment to supplement the natural flow to the water body and raise the water level.

Finding and Recommendation - The Council finds that lake augmentation wells have the potential to create a groundwater dispute, and recommends that lake augmentation wells should be included in the definition of “high capacity well,” Section 31701(j), and a definition of “Lake augmentation well” should be added to Section 31701.

Issue #5 – Complaint Resolution Requirements

Discussion – In Section 31702(4), the MDA is allowed 14 days following the filing of a complaint that alleges interference from an agricultural well to resolve the complaint. If not resolved within 14 days, the complaint is referred to the MDEQ. The program implementation experience to date suggests that this time may be too short in many cases. The MDA may be making substantial progress that could soon thereafter result in an efficient and effective resolution of the complaint.

There are four parties in a complaint involving an agricultural well: the complainant (owner of the small quantity well), the owner of the high capacity well, the MDA, and the MDEQ.

Findings and Recommendations – The Council finds that the 14 days allowed for the MDA to resolve a dispute should be extended in certain cases. The Council recommends that Section 31702(4) be amended to allow an extension to a specific date if all parties agree that the additional time will likely result in resolution of the complaint. Further, the time extension should be revoked upon written request of any one of the parties.

Issue #6 – Notification of Complaint

Discussion – Act 177 does not require the state to notify the owner of a high capacity well when a complaint is filed alleging a groundwater dispute. It is the current policy of the state agencies to notify the high capacity well owner because that is often critical to the resolution process.

Findings and Recommendations – The Council finds that notice to the high capacity well owner following the filing of a complaint is appropriate and essential to the complaint resolution process. The Council recommends an amendment to Section 31702 to add this requirement. The Council also recommends, through educational materials or other means, a requirement for the state to encourage a small quantity well owner to meet and discuss issues with the high capacity well owner in advance of filing a complaint.

Issue #7 – Illegal Wells

Discussion – State legislation was enacted on February 14, 1967 (now Part 127, Water Supply and Sewer Systems, of the Public Health Code, 1978 PA 368, as amended) creating a state well construction code. Any well constructed after February 14, 1967, not meeting the code requirements is considered an “illegal well.” There are many wells constructed before this date that are still in use yet do not conform to the current standards.

The Council recognizes the extraordinary burden of a high capacity well owner if there are small quantity wells in the area constructed before February 14, 1967. If these wells are shallow in depth (less than the state well code standard), any lowering of the groundwater level is likely to create a dispute. However, the number of these wells is decreasing each year as old wells fail and are replaced or wells are abandoned when a community water system is extended.

Findings and Recommendations – The Council finds that the existing language in Section 31706(1) is satisfactory and recommends no action.

Issue #8 – Disputes Involving Two or More High Capacity Wells Or Two or More Small Quantity Wells

Discussion – The Council recognizes that disputes between owners of high capacity wells or between owners of small quantity wells are not covered in Act 177. There are limited or no data readily available to suggest this is a problem.

Findings and Recommendations – The Council finds that disputes between high capacity well owners and disputes between small quantity well owners are disputes between equals with appropriate redress available through usual and customary adjudicative processes. The Council recommends no action other than suggesting that this information be tracked by the MDEQ staff working in the groundwater dispute resolution program.

Issue #9 – Water Use Reporting and Impact on Groundwater Dispute Resolution

Discussion – Water use reporting is covered by Part 327, Great Lakes Preservation, of Act 451, and was amended by Act 148. The data reported to the state are used extensively in the resolution of groundwater disputes.

The owner of a farm, who makes a withdrawal for an agricultural purpose, including irrigation, has two options:

1. Report to the MDEQ under Section 32707, or
2. Report water use to the MDA by annually submitting a water use conservation plan under Section 32708.

Under the second option (reporting under Section 32708), the well location and water use data are aggregated by township. For purposes of groundwater dispute resolution, the aggregated township data is difficult to use and can result in false conclusions by the state agencies implementing Act 177.

The Council recognizes that data compiled at the township level does not provide the necessary detail to investigate and resolve specific groundwater disputes. The Council also recognizes that the data reported to the MDA are supplied at the farm level, not to the same precision as reporting under Section 32707. The MDA then aggregates data to the township level; thus, even when more specific location-based data are available, it is not reported to the MDEQ.

If a complaint is filed under Act 177 against an owner of a high capacity well used for agriculture, the MDA has the initial responsibility for investigating the complaint. The MDA should commence a well investigation, including but not limited to, determining the precise location(s) of wells that may be involved in the dispute. While the MDA may rely on farm level reported data, the MDA should gather any necessary specific well locations from the parties as well as data on well capacity and water use when this information is missing from reported records. This well-specific data and well location data should be added to the record.

If the MDA cannot successfully resolve the dispute within the statutory deadlines, they should transfer all material and pertinent data, including well specific data and precise locations of the wells in question, to the MDEQ. Upon resolution of any well dispute, if it is found that the high capacity well has adversely affected the small quantity well as alleged in the dispute, the data gathered on the wells in question should be entered into the state Wellogis database with as much specificity as exists.

Findings and Recommendations – The Council finds that water use reporting aggregated by township is inadequate for groundwater dispute resolution. The Council recommends clarification to the process that authorizes the MDA to pass well-specific information to the MDEQ for dispute resolution.

Issue #10 – Complaint Tracking and Reporting

Discussion – The MDEQ keeps records of all complaints filed along with the complaint resolution status. In some cases, a complaint is filed, recorded by the MDEQ, and made available to the public via the MDEQ Web page. If the complainant fails to submit a required well assessment, the complaint stays on the MDEQ records even though the high capacity well owner has no duty to respond to the complaint and no dispute resolution process is initiated.

Findings and Recommendations – The Council finds that the public reporting of complaints should be limited to complaints determined to be administratively complete by the MDEQ. The Council recommends that the MDEQ adopt an internal policy to make public only complaints determined by the MDEQ to be administratively complete, or that Act 177 be amended to limit public reporting of complaints to those determined by the MDEQ to be administratively complete.

Issue #11 – Evaluating the Groundwater Dispute Resolution Program

Discussion – The Council discussed the ongoing need for the groundwater dispute resolution program, especially if the number of complaints changes over time.

Findings and Recommendations – The Council finds that a periodic review of Act 177 to determine the need is advisable and further concludes that Act 177 should be amended to include this provision. The Council suggests that this review be conducted by a representative group of stakeholders in a manner open to public access and input.